UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte YPKE VINCENTIUS JOHANNES MARIA VAN OOOSTERHOUT and JANNY ELISABETH VAN EMST

Appeal No. 2005-2742
Application No. 09/668,555

ON BRIEF

Before ADAMS, GRIMES[1] and GREEN, Administrative Patent Judges.

ADAMS, Administrative Patent Judge.

REQUEST FOR REHEARING

Appellants request reconsideration (rehearing) of the Board's Decision entered April 28, 2006 (Decision), wherein the examiner's rejection of the appealed claims under 35 U.S.C. § 102 and § 103 was affirmed.

In their Request for Rehearing (Request), appellants make a series of assertions. We take each in turn.

[1] The merits panel that issued the initial opinion in this case included Administrative Patent Judge Ellis, who retired from the U.S. Patent and Trademark Office before Appellants filed their Request for Rehearing. Administrative Patent Judge Grimes has replaced Administrative Patent Judge Ellis on this merits panel. See In re Bose Corp., 772 F.2d 866, 227 USPQ 1 (Fed. Cir. 1985).

I. The Board overlooked a teaching in Scannon:

Appellants "admit that Scannon states '[t]hus, in one embodiment of the present invention, an immunosuppressive immunotoxin composition will comprise at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters.'" Request, page 2. Accord, Decision, page 3. Nevertheless, as we understand appellants' argument, appellants believe the Board has overlooked an "alternative" disclosure in Scannon, which appellants believe to be more relevant than the one relied upon by the Board. Specifically, appellants assert (id., emphasis removed), the Board overlooked Scannon's disclosure that:

> Alternatively, the immunotoxin composition will be composed of two or more immunoglobulins, each reactive with a different marker of the same or different cell populations to ensure a broad spectrum of T-cell neutralization. Typical combinations will include immunoglobulins recognizing CD4 and CD8, TAC and CD4, or CD7, CD11 and CD5.

While it is true that the Board did not specifically address this particular alternative disclosure in Scannon, the Board did address yet another "alternative" embodiment of Scannon. Specifically, Scannon's disclosure at page 4 of "an alternative composition that may comprise 'a collection of immunoglobulins reactive with a plurality of T-cell markers, such as those associated with the antigen clusters CD2, CD3, CD4, CD5, CD6, CD7, CD9, CD11 and CD45R. . . .'" Decision, page 4. Nevertheless, the Board found (id.), Scannon teach

> a composition containing the immunotoxins anti-CD3-ricin A and anti-CD7-ricin A. In our opinion, such a composition is within the scope of appellants' claim 1, which is drawn to a pharmaceutical composition that consists essentially of first molecules directed against CD3, and second molecules directed against CD7, wherein

at least one of said first and said second molecules include a toxic moiety.

While it is true that Scannon discloses "alternative" embodiments, there is no doubt that Scannon discloses an immunotoxin within the scope of appellants' claim 1. Accordingly, we are not persuaded by appellants' argument.

II. The Board misunderstood Scannon's disclosure:

According to appellants (Request, page 3), the Board's interpretation of the phrases in Scannon's disclosure of "pan T-cell immunoglobulin reactive agent" and "reactive with the CD3, CD5 or CD7 antigen clusters" is incorrect. According to appellants the term "agent" does not mean "agents" and the term "or" does not mean "'and' or 'and/or'".

We encourage appellants to take a step back and reflect upon the entire sentence from which they parse out two phrases. In its entirety, the sentence appellants focus on states, as appellants admit (Request, page 2, emphasis added), "in one embodiment of the present invention, an immunosuppressive immunotoxin composition will comprise at least one pan T-cell immunoglobulin reactive agent[2], e.g., reactive with the CD3, CD5 or CD7 antigen clusters."

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[2] Appellants direct our attention to "claim 7" of Scannon to suggest that CD3, CD5 and CD7 are merely "preferred pan-T-cell antigens." Request, page 3. Scannon's claim 7 depends from claim 1 which makes reference to an anti-pan-T-cell immunoglobulin. Claim 7 specifies that the "immunoglobulin [of claim 1] is reactive with an epitope on an antigen cluster selected from the group consisting of CD3, CD5, and CD7." We are not persuaded by this assertion. Assuming, arguendo, that this assertion was correct, it fails to support a suggestion that all other antigen clusters taught by Scannon are pan-T-cell-antigens. As set forth on page 9 of Scannon, "an immunosuppressive immunotoxin composition will comprise at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters." Appellants fail to provide any evidence on this record to support such an assertion. To the contrary, we would direct appellants' attention to claim 14 of Scannon, which refers to CD3, CD5, and CD7 in addition to CD2, CD4, CD6 and CD9, but depends from a claim, claim 11, that does

In doing so, we encourage appellants to recognize that the first phrase they direct our attention to, "pan T-cell immunoglobulin reactive agent", begins with the clause, "at least one". As we understand it, "at least one" means one or more. Accordingly, there may be one or more reactive agents. Thus, despite appellants' assertion to the contrary, the proper construction of this phrase is one or more reactive agents.

Now, the second phrase to which appellants direct our attention, "reactive with the CD3, CD5 or CD7 antigen clusters". As discussed above, when the sentence is correctly read in full, we have one or more reactive agents that are reactive with the CD3, CD5 or CD7 antigen clusters. As we explained in the paragraph, bridging pages 3-4 of the Decision, we understand Scannon's use of the phrase "at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters," to represent a short-hand way of expressing the seven compositions: (1) CD3; (2) CD5; (3) CD7; (4) CD3 and CD5; (5) CD3 and CD7; (6) CD5 and CD7; or (7) CD3, CD5 and CD7.

For the foregoing reasons, we are not persuaded by appellants' arguments.

III. Scannon reduces a single embodiment to practice:

According to appellants (Request, page 4), "it would be unusual for the single embodiment of CD5 disclosed in Scannon to provide an adequate basis to

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not make reference to a pan T-cell immunoglobulin reactive agent. For the foregoing reasons, we are not persuaded by appellants' argument.

support the generic use of 10 other target molecules or the extensive number of possible combinations thereof." This argument was addressed in the Decision, see pages 5-6. For the reasons set forth therein, we are not persuaded by appellants' argument.

CONCLUSION

We have carefully reviewed the original opinion in light of appellant's Request, but we find no point of law or fact that we overlooked or misapprehended in arriving at our decision. Therefore, appellant's request has been granted to the extent that the decision has been reconsidered, but such request is denied with respect to making any modifications to the Decision.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

REQUEST FOR REHEARING DENIED

Donald E. Adams)
Administrative Patent Judge)
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) BOARD OF PATENT
)
Eric Grimes) APPEALS AND
Administrative Patent Judge)
) INTERFERENCES
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Lora M. Green)
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